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Supreme Court of the United States

APRIL TERM, 1963.

No. ...897

CARMINE LI GRECI,

Claimant-Petitioner,

vs.

GREENE, TWEED & COMPANY,

Employer-Respondent,

SPECIAL FUND CONSERVATION COMMITTEE,

Carrier-Respondent,

WORKMEN'S COMPENSATION BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

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vs.

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SPECIAL FUND CONSERVATION COMMITTEE,
Carrier-Respondent,

WORKMEN'S COMPENSATION BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

TO THE HON. CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

CARMINE LI GRECI, petitioner herein, prays that a writ of certiorari be issued to review the final decree of the Court of Appeals of the State of New York, which denied an appeal to the petitioner on constitutional grounds from the order of the Appellate Division, Third Department, State of New York, dismissing his earlier appeal to that court and affirming the decision of the Workmen's Compensation Board of the State of New York, which denied

petitioner permanent disability benefits under the Workmen's Compensation Law of New York State.

Statement of the Matter Involved.

This case involves the constitutional right of a permanently disabled and indigent working man to demand and receive without charge a medical examination and report by an impartial expert employed by the Workmen's Compensation Board of the State of New York at the outset of the proceedings in order to prove his claim to permanent disability benefits under New York's Workmen's Compensation Law.

Also involved in this case are the ancillary but also important questions whether that same disabled, indigent workingman has been denied his constitutional right to due process of law and equal protection of the laws, as well as a fair hearing under the Workmen's Compensation Law of the State of New York when (1) at the outset of the hearings to prove his claim to permanent disability benefits, the Referee not only denied his request for a medical examination without charge as specifically provided under Section 13(d) W. C. L. but, more importantly, compelled him at the risk of default in the proof of his claim, to produce his own medical experts to examine him, to report on that examination to the Workmen's Compensation Board, and to appear and testify before the Referee and in rebuttal of the State Fund's experts who were paid by the State of New York; all, at the sole expense of the petitioner, and (2) This, following an erroneous denial to petitioner of consideration for permanent disability benefits some 14 years earlier, and just about one year after his industrial accident, by another Referee, because the latter erroneously concluded he was ineligible for such benefits because he

was still employed and still had considerable earning power at the time of that application, and (3) when, at the Review stage of the proceedings and following the close of all the hearings before the Referee and the Workmen's Compensation Review Panel the latter suddenly appointed an "impartial" medical expert to examine and report to it on petitioner's claim while denying the petitioner the right to rebut such evidence, and (4) when, the Workmen's Compensation Board of the State of New York, despite repeated objections of petitioner to such a procedure, ordered a suspension of all further proceedings on his claim, unless petitioner complied with its direction to be examined by an "impartial" expert employed by it at the close of the hearing on his application for Review, while denying him the right to rebut such evidence.

Petitioner maintains that these several actions of the Referees and of the Workmen's Compensation Board of the State of New York denied him his constitutional right to due process of law, equal protection of the law under the Federal and New York State Constitutions and to a fair hearing under the Workmen's Compensation Law of the State of New York.

These same points were raised by petitioner and by petitioner's counsel, both in the brief filed on behalf of petitioner in his appeal to the Appellate Division, Third Department of the State of New York, and in the oral argument before that Court in May 1962. Some 20 pages of a 43 page brief filed with the Appellate Division on behalf of the petitioner, were devoted to these constitutional issues of denial of due process, equal protection and a fair hearing to him by the Referees and the Board [See Points IV and V of Claimant's Brief on Appeal to the Appellate Division, Third Department, 17 A. D. 2d 673 (1962) 230 NYS 2d 528, copies hereto attached].

Furthermore, these same constitutional issues were raised on petitioner's application for leave to appeal to the Court of Appeals of the State of New York in October 1962, which was denied by that Court on December 6, 1962 [See Points I and II of Petitioner's Brief in Support of Motion for leave to Appeal made under Section 589 CPA filed in the Court of Appeals. *Matter of Li Greci vs. Greene, Tweed & Co.*, 12 N. Y. 2d 644 (1962), copies hereto attached].

The Facts.

The petitioner injured his spine in an industrial accident in February 1943 and received treatment for it by his first treating physician over a period of several weeks following the accident. In June 1944, his then attorney applied to reopen his claim on the basis of injuries other than those for which he had been earlier awarded compensation ($125 for a facial scar in December 1943). In May 1945, following X-ray and other examinations by the Workmen's Compensation Board and his carrier physicians he was told by the then Referee that he was not eligible for permanent disability benefits because he was still working. He was told he could reopen his claim any time thereafter when he was disabled from work due to his back injury and to produce a certificate from a doctor to that effect. Petitioner's protest at that hearing that he was doing much lighter work in 1945, not involving his back, was waved aside and he was told to reapply when he was no longer able to work and earn wages. This ruling, we submit, was clearly in error, since a claim for permanent partial (non-scheduled) disability benefits may be considered apart from or in addition to, a claim for regular compensation benefits. Petitioner thereafter in intervening years sought treat-

ment from chiropractors and physicians and a hospital (1955) for his back disability which grew steadily worse until he was certified as completely disabled in 1956 by the Social Security Administration. In 1957, he tried to get his first treating physician to present a certificate of his disability as a basis for reopening his claim, but the latter refused. The latter had much earlier (1943) refused to continue treatments to petitioner's spine because the insurance carrier had allegedly refused to authorize any further treatments to petitioner's back. In 1958, petitioner again applied to reopen his claim for permanent disability benefits for his back disability, presenting a C-27 form signed by his then treating physician. Then followed the several hearings before the Referee in the period 1958-1960 and the Review hearing before the Workmen's Compensation Board during which, the several actions took place, which form the basis for this petition for certiorari, and earlier, of petitioner's appeal in the Appellate Division, Third Department of New York State.

The Referee denied petitioner's claim for permanent disability benefits in 1960. The Review Panel of the Workmen's Compensation Board upheld the Referee's decision (1961). The Appellate Division, Third Department of the State of New York dismissed his appeal from these findings in July 1962. *LiGreci* v. *Greene, Tweed & Co.*, 17 A. D. 2d 673 (1962); 230 N. Y. S. 2d 528. It also refused to find that there was any "reasonable" basis for the constitutional issues raised by the petitioner on his appeal to that Court, which were earlier discussed under "Statement of the Matter Involved" (*supra*). Thereafter that court denied a motion made by petitioner in August 1962 to amend the remittitur and resettle its order dismissing the appeal to provide that the constitutional questions raised by petitioner on his appeal to that court were considered and

passed on by the court in arriving at its decision. This motion, if granted, would have permitted a further appeal "as of right" to the Court of Appeals by the petitioner because of the constitutional issues raised in his first appeal [See Memorandum decision of A. D. Third Department, September 26, 1962 17 A. D. 2d 753 Case 14.]

Thereafter, the Court of Appeals in December 1962, in effect, refused to review that conclusion of the lower court although the petitioner had undeniably raised these constitutional points on his appeal to the lower court [See Memorandum Decision of Court of Appeals of New York, December 6, 1962. *Matter of Li Greci vs. Greene, Tweed & Co.*, 12 N. Y. 2d 644]. It ruled that the application for leave to appeal made by petitioner to the Court of Appeals in October 1962, under Section 589, Civil Practice Act, State of New York (a discretionary procedural statute) was not timely made. This involves a technical question of statutory interpretation, since the Court of Appeals elected not to consider the merits of petitioner's application. Ordinarily, petitioner would therefore fail in an attempt to appeal further to this court.

Petitioner's position on that point, however, is the following: If the lower court (Appellate Division) *erred* (and we submit, most respectfully, that it did) in refusing to find that the constitutional issues raised on petitioner's appeal to that court were substantial enough to warrant a further appeal "as of right" to the Court of Appeals, then the petitioner's motion for leave to appeal made to the Court of Appeals under Section 589 of the Civil Practice Act in October 1962 was, in fact, timely made. We submit two reasons in support of that position: (1) if the lower court erred, the Court of Appeals should have considered

the application for leave to appeal on the *merits*, since constitutional issues are the basis for an appeal "as of right" guaranteed to parties under the Constitution of the State of New York (See Section 588 Civil Practice Act of New York); (2) if the lower court erred, the prior application made to it in August 1962, to resettle its order, and permit a further appeal "as of right", which was not decided until September 26, 1962 and on which an order was not entered until petitioner did so in November 1962, extended petitioner's time to appeal to the Court of Appeals to sixty days following the entry of the order of denial (See Section 592 Civil Practice Act). Petitioner's application to the Court of Appeals made on October 24, 1962 was therefore timely made.

Now, we submit, if the constitutional basis for the first appeal was in fact "substantial" then, the Court of Appeals should have considered petitioner's application for leave to appeal *on the merits*, and should have reviewed the lower court's findings, on the constitutional issues presented to it in that first appeal. Failing that, petitioner's sole remaining relief is by this petition for writ of certiorari made to this court within 90 days following the entry of the Court of Appeals' order denying petitioner leave to appeal (December 6, 1962). Therefore, we submit, it remains for this Court to decide if the petitioner's constitutional rights were denied him by the several actions of the Referees and the Workmen's Compensation Board of the State of New York since these points were timely raised by petitioner in the proceedings before the Workmen's Compensation Board[1] before the Appellate Division, Third

[1] 47a-48a, 86a, 89a, 93a, 102-103a, 109-110a Claimant's Appendix. Appellate Division, 3rd Dept., N. Y.

Department[2] and before the Court of Appeals of the State of New York.

Jurisdiction.

1. Jurisdiction of this Court is involved under Title 28, U. S. Code, Section 1257, which provides in part:

> "Final judgment or decrees rendered by the highest court of a state, on which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .[3] By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . .".

2. The following cases are believed to sustain the jurisdiction of this Court:

> *N. Y. Central RR. Co.* v. *Bianc,* 250 U. S. 596, 40 S. Ct. 44, 63 L. Ed. 1161;
>
> *Market St. R'wy Co.* v. *RR Com'n of State of California,* 65 S. Ct. 770, 324 U. S. 548, 89 L. Ed. 1171;
>
> *Young* vs. *Ragen,* 69 S. Ct. 1073, 337 U. S. 235, 93 L. Ed. 1333.

3. The Court of Appeals of the State of New York is the highest Court of the State.

4. The order of which review is sought is a final order of the Court of Appeals of the State of New York.

5. The order herein sought to be reviewed was filed on December 6, 1962.

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[2] Claimant's Brief in App. Div. 3rd Dept. at pps. 13-31, 41-42, Points IV and V thereof.

[3] Claimant's Brief in support of Motion for Leave to Appeal in Ct. of Appeals, Points I and II.

6. The Federal question of substance which has been decided by the State Court is that (1) the constitutional rights of equal protection of the laws and to due process of law are not violated when a physically disabled, indigent workingman is denied a medical examination and report by a medical expert employed and paid at State expense, at the outset of the proceedings in order to prove his right to permanent disability benefits, although that privilege was expressly provided under Section 13(d) of the Workmen's Compensation Law of the State of New York, and (2) whether the same rights to due process and equal protection are violated when an injured, indigent workingman is compelled to produce his own medical experts to examine, report and testify at the workingman's sole expense, and (3) whether the same rights to due process and equal protection are not violated when a workingman is denied the right to rebut the evidence of a state-employed and paid expert suddenly appointed by an industrial compensation board at the close of all the hearings on his claim, and (4) whether the erroneous denial by a Referee, to an injured workingman of consideration of his eligibility for permanent disability benefits within a year or so following his accident because he was still employed and had considerable earning power at much lighter work not involving his disability did not, in fact, defeat his substantial right to compensation (permanent partial [non-scheduled] disability) benefits because it delayed consideration of his claim until he was completely disabled and unable to work, some 14 years later and whether (5) all of these facts, including the errors of the two Referees and the Review Panel of the Workmen's Compensation Board of New York, did not combine to defeat this injured, disabled workingman's claim for permanent disability benefits, all in contravention of his constitutional rights to due process and

equal protection of the laws and to a fair hearing under the Workmen's Compensation Law of New York State.

7. The Federal questions were timely raised and considered. This point was discussed under the heading of the paragraph entitled "The Facts" (*supra*).

Reasons Relied Upon for Allowance of the Writ.

The Appellate Courts of the State of New York have decided in this case important questions under the 5th and 14th Amendments of the Federal Constitution when they denied consideration to an injured indigent and completely disabled workingman and in conflict with the following cases decided by this Court:

N. Y. Central RR. Co. v. *Bianc*, 250 U. S. 596, 40 S. Ct. 44, 63 L. Ed. 1161;
Market St. R'wy Co. v. *RR. Com'n of State of California*, 324 U. S. 548, 65 S. Ct. 770, 89 L. Ed. 1171;
Young vs. *Ragen*, 69 S. Ct. 1073, 337 U. S. 235, 93 L. Ed. 1333.

Furthermore, the public interest demands that all injured workingmen be protected in this vital area of comparatively recent remedial legislation. We submit, that this case, although somewhat unusual in the combination of errors which combined to prevent this workingman from receiving his just due*, is indicative of what may happen

* Following the earlier error of Referee in 1945 denying him consideration for permanent disability benefits which compelled petitioner to wait 14 years before applying again, the State Fund and impartial experts both chorused their opinions that his long back disability was due to Parkinson's disease just diagnosed in 1956. Both experts, however, readily admitted on cross-examination that the cause of Parkinsonism was unknown to medical science. So petitioner was faced with the anomaly of having the Board deny his claim for permenant disability benefits in 1961 for a back condition that arose out of his accident in 1943 and for which he was treated 13 years before the condition (Parkinsonism) was first diagnosed in 1956 and having the Board attribute his long progressive back disability to a disease, the cause of which is unknown to medical science.

to hundreds of others similarly situated who are not fortunate enough to have come this far up the ladder of judicial review where their constitutional rights to due process and equal protection and to a fair hearing can be protected against administrative bungling of workmen's compensation statutes. These people ordinarily cannot afford the luxury of judicial review. They simply haven't got the means. So if this case is reviewed and the actions of the administrative agency herein scrutinized and perhaps reversed after judicial inquiry, it will serve to make all other administrative agencies entrusted with the health and welfare of injured workingmen, extremely careful in seeing that they shall receive what the state legislature intended they should, when they enacted workmen's compensation benefits into law.

Your petitioner respectfully submits that the writ of certiorari should issue to the end that this Court may review the decisions of the Appellate Division and the Court of Appeals of the State of New York, to determine whether these State Courts have, in fact, failed to give petitioner the protection guaranteed him by the 5th and 14th Amendments of the Federal Constitution.

Lucian J. Rossi,
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New York, N. Y.

Order Dismissing the Appeal in the Appellate Division, Third Department.

At a Term of the Appellate Division of the Supreme Court, in and for the Third Judicial Department, held at the Court House in the City of Albany, New York, commencing on the 30th day of April 1962.

Present:

Hon. FRANCIS BERGAN,
Presiding Justice,

Hon. JAMES GIBSON,
Hon. J. CLARENCE HERLIHY,
Hon. WALTER B. REYNOLDS,
Hon. DONALD S. TAYLOR,
Associate Justices.

IN THE MATTER

of

The Claim for Compensation under the Workmen's Compensation Law, made by CARMINE LI GRECI,
Claimant-Appellant.

against

GREENE, TWEED & COMPANY, Employer, and EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY, Carrier,
Respondents,

SPECIAL FUND FOR REOPENED CASES UNDER SEC. 25-a,
Respondent;

WORKMEN'S COMPENSATION BOARD,
Respondent.

The appeal herein having been brought before this Court during the above stated Term, and having been argued or

submitted for the Appellant, Carmine Li Greci, by Lucian J. Rossi, Esq., for the Respondent, Workmen's Compensation Board, by Daniel Polansky, Esq., and for the Respondent, Special Fund for Reopened Cases under Section 25-a, by John M. Cullen, Esq., and the Court after due deliberation having handed down its decision thereon on the 13th day of July, 1962;

Now, on motion of John M. Cullen, Attorney for the Special Fund for Reopened Cases under Section 25-a, Respondent, it is

ORDERED, that the "decision of the Workmen's Compensation Board be unanimously affirmed, without costs."

JOHN J. O'BRIEN,
Clerk.

A true copy

Entered: July 25, 1962
JOHN J. O'BRIEN
Clerk.

Decision of Appellate Division, Third Department, Denying Resettlement of its Order Dismissing the Appeal.

SUPREME COURT,

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

Order Entered November 9, 1962.

No. 5 Decision handed down September 26, 1962

4206—IN THE MATTER

of

the Claim of CARMINE LI GRECI,

Appellant,

v.

GREENE, TWEED & Co., *et al.*,

Respondents.

Application denied.

Order of Court of Appeals, December 6, 1962.

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Sixth day of December A. D. 1962.

Present,

Hon. CHARLES S. DESMOND,
Chief Judge, presiding.

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3 Mo. No. 800

IN THE MATTER

of

the Claim for Compensation &c. made by CARMINE LI GRECI,
Appellant,

vs.

GREENE, TWEED & COMPANY & ano., &c., and Special Fund for Reopened Cases under Sec. 25-a,
Respondents,

WORKMEN'S COMPENSATION BOARD,
Respondent.

A motion for leave to appeal to the Court of Appeals &c. in the above cause having been heretofore made upon the part of the appellant herein and papers having been submited thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that the motion was not made within the time specified in section 592, subdivision 3, of the Civil Practice Act.

A copy

GEARON KIMBALL
Deputy Clerk